Supreme Court, U.S.
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SEP 4
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No. 86-181

In the Supreme Court of the United States

OCTOBER TERM, 1986

PATRICIA A. DIXON, PETITIONER

v.

WESTINGHOUSE ELECTRIC CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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QUESTION PRESENTED

Whether the 300-day charge filing period, made applicable by Section 706(e) of Title VII of the Civil Rights Act of 1964 when the complainant "initially institute[s] proceedings" with a state or local agency, applies where the Equal Employment Opportunity Commission (EEOC) and the state or local agency have entered into a worksharing agreement determining that the EEOC rather than the state or local agency will initially process the complainant's charge.

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INTEREST OF THE UNITED STATES

The Equal Employment Opportunity Commission (EEOC) is the federal agency primarily responsible for administering federal fair employment statutes, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and both the Attorney General and the EEOC have substantial responsibility for enforcement of Title VII (see 42 U.S.C. 2000e-5(a) and (f)(1)). This case concerns the meaning

of Section 706(e) of Title VII, 42 U.S.C. 2000e-5(e), which provides that a complainant must file charges with EEOC within 180 days of the alleged discrimination, except that a complainant is allowed 300 days if he has "initially instituted proceedings with a State or local agency with authority to grant or seek relief." In particular, the case concerns the relevance to those limitations periods of worksharing agreements entered into by the EEOC, pursuant to Section 709(b), 42 U.S.C. 2000e-8(b), with state and local agencies that are administering their own employment discrimination laws. Hence, this case raises issues that directly and significantly implicate the United States and the EEOC's statutory responsibilities. For this reason, the EEOC participated as amicus curiae in the court of appeals. The strong federal interest in this and related issues also prompted our petition for a writ of certiorari in *Love* v. *Pullman Co.*, 404 U.S. 522 (1972), and our participation as amicus curiae in *University of Tennessee* v. *Elliott*, No. 85-588 (July 7, 1986), *Mohasco Corp.* v. *Silver*, 447 U.S. 807 (1980), and *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750 (1979) (Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. (& Supp. II) 621 *et seq.*).

STATEMENT

1. On December 18, 1981, petitioner received notice from respondent, Westinghouse Electric Corporation, that it was terminating her employment (Pet. App. 40). Petitioner had been employed by Westinghouse for approximately ten years (*ibid.*). After unsuccessfully pursuing relief under contractual grievance and arbitration procedures, petitioner filed a charge of unlawful sex discrimination, based on

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, with the EEOC on August 4, 1982, 230 days after her discharge (Pet. App. 40-41).

Pursuant to a "worksharing agreement" entered into between the EEOC and the State of Maryland Commission on Human Rights (MCHR), the EEOC transmitted a copy of the charge to the MCHR on August 6, 1982 (Pet. App. 41-42).[1] Under the worksharing agreement, MCHR waived its right under Title VII (see 42 U.S.C. 2000e-5(c)) to an initial period of exclusive processing of charges (C.A. App. 83).[2] The waiver includes, with some exceptions,[3]

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[1] The EEOC has entered into worksharing agreements, pursuant to Section 709(b) of Title VII, 42 U.S.C. 2000e-8(b), with approximately 80 of the state and local fair employment agencies that enforce state and local employment discrimination laws. Under these agreements, certain categories of discrimination charges are processed by state and local authorities; with respect to other categories, the state or local agency often waives its right under the statute to initiate review, and the EEOC processes the charge from the outset.

[2] "C.A. App." refers to the joint appendix filed in the court of appeals, which includes, among other items, a copy of the worksharing agreement effective between the EEOC and the MCHR during the relevant time period (C.A. App. 80-87). The agreement appended to the petition for a writ of certiorari (Pet. App. 54-64) is the agreement currently in force, which is substantially similar but not identical to that earlier agreement.

[3] The waiver does not extend to charges originally received by the EEOC if (1) the charges are against certain respondents, as agreed to in writing by the EEOC and MCHR; (2) the charges allege at least one basis of discrimination which is outside the EEOC's jurisdiction; or (3) the charges are filed by the MCHR or one of its commissioners (C.A. App. 82). In addition, under the agreement, the MCHR and the EEOC each retains the right to express an interest in pursuing any specific

charges originally received by the EEOC (C.A. App. 82-83). Accordingly, on August 11, 1982, the MCHR returned the transmittal form to the EEOC, stating that it would not process the charge (Pet. App. 42). The MCHR also informed petitioner that it had terminated its proceedings because the EEOC could better process her charge (*ibid.*). The EEOC subsequently issued petitioner a right to sue letter, without making any final determination on the merits of her charge (*id.* at 43).[4]

2. Petitioner filed this action in the United States District Court for the District of Maryland, for injunctive relief and money damages alleging, inter alia, that Westinghouse had engaged in unlawful sex discrimination in violation of Title VII (Pet. App. 43-44; C.A. App. 1-6). Westinghouse filed motions for summary judgment, which the district court granted, dismissing the Title VII claim on the ground that petitioner's filing of her charge with the EEOC was untimely because it occurred more than 180 days after the date of the alleged unlawful employment practice (the date of her discharge) (Pet. App. 44-45; C.A. App. 305-324). The court ruled that the submission by the EEOC to the MCHR of a transmittal form with a copy of petitioner's charge was not sufficient to trigger the 300-day limitations period for charges "initially instituted" with the MCHR, because, under the worksharing agreement, the MCHR

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charge, even if primary responsibility for its processing is assigned by the agreement to the other agency, and the other agency will "wherever possible" defer to that request (C.A. App. 84).

[4] The EEOC's informal conciliation efforts did, however, lead to reinstatement of petitioner to her former position in January 1983 (Pet. App. 43).

had waived its right to process the charge (C.A. App. 310-318). According to the court, "[t]he transmittal was not undertaken in contemplation of any substantive action being taken by the MCHR" (*id.* at 316 (footnote omitted)).

3. The Fourth Circuit affirmed (Pet. App. 39-53). The court concluded that "[t]he plain and unambiguous meaning of section 706(e) is that * * * [t]he only exception [to the 180 day statute of limitations] is when * * * the charging party has initially instituted proceedings before th[e state or local] agency" and that EEOC's referral in this case did not satisfy that requirement (*id.* at 49). The court acknowledged that EEOC regulations provide that the 300-day limitations period should apply, but ruled that the " 'EEOC's 'interpretation' of the statute cannot supersede the language chosen by Congress' " (*id.* at 50, quoting *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 825 (1980)). Like the district court, the court stressed that under the worksharing agreement "it was never contemplated that the MCHR would play a substantive role in processing the charge" and, consequently, the rationale for the extended limitations period—allowing the complainant additional time to pursue state remedies—was absent (Pet. App. 51-52). The EEOC's transmittal "was for informational purposes only and did not constitute an 'initially instituted' charge within the meaning of [Section 706(e)]" (*id.* at 52).

DISCUSSION

Petitioner contends that the decision of the court of appeals is incorrect, is inconsistent with decisions of this Court and of other courts of appeals, and presents an important issue warranting this Court's review. We agree.

1. The court of appeals' ruling that petitioner was not entitled under Section 706(e) of Title VII to the extended 300-day filing period applicable to charges initially instituted with a state fair employment practice (FEP) agency is flawed in two fundamental respects. The ruling rests on an unreasonably narrow construction of "initially instituted" as used in Section 706(e), and it misapprehends the legal relevance of the terms of worksharing agreements entered into between the EEOC and state and local FEP agencies.

It is not disputed that after receiving petitioner's charge, the EEOC immediately transmitted a copy to the MCHR. This is plainly sufficient to "institute" proceedings with the state agency under Section 706(e). See *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 816-817 (1980) ("state proceedings were instituted by the EEOC when it immediately forwarded his letter to the state agency * * * [and s]ince the EEOC could not proceed until either state proceedings had ended or 60 days had passed, the proceedings were 'initially instituted with a State * * * agency' "); see also *Love* v. *Pullman Co.*, 404 U.S. 522, 525 (1972) ("Nothing in [Title VII] suggests that the state proceedings may not be initiated by the EEOC acting on behalf of the complainant rather than by the complainant himself.").

Nor may it be objected that this filing with the EEOC and the MCHR was not made in a timely manner. It is not disputed that petitioner filed her charge with the EEOC almost 230 days after the alleged unlawful employment practice.[5] As this Court

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[5] The court of appeals did not address (Pet. App. 47 n.2) and the petition for a writ of certiorari does not present the issue whether, in the context of Title VII, a charge that is

stated in *Mohasco Corp.* v. *Silver*, 447 U.S. at 814 n.16, a "complainant in a deferral state * * * need only file his charge within 240 days of the alleged discriminatory employment practice in order to insure that his federal rights will be preserved." [6]

The court of appeals' contrary conclusion rests on the worksharing agreement entered into between the MCHR and the EEOC, under which the MCHR waived its right under Section 706(c) of Title VII (see 42 U.S.C. 2000e-5(c)) to exclusive initial processing of certain types of charges. The court of appeals apparently concluded that because the MCHR agreed to have the EEOC initially process certain charges, including most of those originally received by the EEOC, those charges became subject to the 180-day rather than the 300-day filing period of Section 706(e). For this to be true as to this particular charge, the terms of the worksharing agreement either must have rendered the MCHR other than "a State * * * agency with authority to grant or seek relief from [the alleged discriminatory practice]," or must have prevented the EEOC from "initially instituting" a charge with the MCHR on behalf of petitioner. Neither interpretation is remotely plausible.

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untimely under the applicable state statute of limitations may nonetheless commence state proceedings within the meaning of Section 706(c), or alternatively, "initially institute" such proceedings, within the meaning of Section 706(e). See *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750 (1979).

[6] The reference to 240 days instead of 300 days in *Mohasco* reflects the Court's holding in that case that unless the state agency terminates its proceedings earlier, a charge can not be deemed "filed" with the EEOC until 60 days after initiation of the state proceedings. See 447 U.S. at 817. Of course, in this case, the MCHR terminated its proceedings earlier.

The status of the MCHR as a state agency entitled under Title VII to an initial period of exclusive processing of charges filed with the EEOC is not denied by the worksharing agreement—quite the opposite is true. The existence of the worksharing agreement, particularly the inclusion of a waiver of the MCHR's right to exclusive processing of certain charges, confirms the agency's special status under Title VII. It is, moreover, the "authority" of the MCHR under state law, which, under Title VII, is the touchstone for determining its status for the purposes of Section 706(e). See 42 U.S.C. 2000e-5(e) (emphasis added) ("initially instituted proceedings with a State or local agency with *authority* to grant or seek relief"); see also 42 U.S.C. 2000e-5(c) (emphasis added) ("In the case of an alleged unlawful employment practice occurring in a State * * * which has a *State * * * law* prohibiting the unlawful employment practice alleged and *establishing or authorizing a State * * * authority to grant or seek relief* * * *, no charge may be filed * * * before the expiration of sixty days after proceedings have been commenced under the State * * * law, unless such proceedings have been earlier terminated"). The precise manner in which the MCHR chooses to exercise any statutory rights conferred by Title VII, including the waiver of any of those rights in a worksharing agreement, does not alter (let alone negate) the fundamental nature of the MCHR's state law authority.[7]

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[7] The contrary view would suggest that even a complainant who filed initially with a state FEP agency would not be entitled to the 300-day limitations period if the worksharing agreement between the state agency and the EEOC happened to waive the state agency's right to initial exclusive process-

The alternative possible basis for the court of appeals' ruling—that the worksharing agreement prevented the EEOC from "initially instituting" the state proceedings on behalf of petitioner—is equally unpersuasive. Indeed, the circumstances of this case reveal the fallacy of that proposition. In this case, pursuant to the worksharing agreement, the EEOC transmitted a copy of the charge to the MCHR, which in turn formally notified both the EEOC and petitioner that it was terminating its proceedings and that the EEOC would handle the charge. Contrary to the court of appeals' characterization (Pet. App. 52), that exchange was not merely for "informational purposes." Under the worksharing agreement, the MCHR expressly reserved the right to reassert an interest in processing a charge to which the agreement generally waived the MCHR's exclusive rights and generally assigned the EEOC primary responsibility (C.A. App. 84).

In any event, even if the effect of the worksharing agreement were to waive completely the MCHR's right to exclusive initial processing, petitioner would still fall within Section 706(e)'s 300-day filing period. The provision for deferral to state proceedings was inserted in the 1964 Act largely to ensure that the state agencies had "every opportunity to employ their expertise and experience without premature interference by the Federal Government." 110 Cong. Rec. 12724-12725 (1964) (remarks of Sen. Humphrey); see *Mohasco Corp.* v. *Silver*, 447 U.S. at 821; *Oscar Mayer & Co.* v. *Evans*, 441 U.S. at 755; see also 110 Cong. Rec. 8193 (1964) (remarks of Sen. Dirksen). Consistent with that congressional pur-

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ing and assign primary responsibility over his particular charge to the EEOC.

pose, the sole inquiry required by Section 706(e) is whether there is a state FEP agency and whether the EEOC has provided the state agency with "every opportunity" by, for instance, consulting with that agency to determine whether it waives its right of exclusive initial processing or otherwise has terminated its proceedings. See *Mohasco Corp.* v. *Silver*, 447 U.S. at 816-817 ("Since the EEOC could not proceed until either state proceedings had ended or 60 days had passed, the proceedings were 'initially instituted with a State * * * agency' prior to their official institution with the EEOC."). Thus, state agency proceedings have been "initially instituted," within the meaning of Section 706(e), even if immediately upon receipt of a copy of a charge from the EEOC, the state agency notifies the EEOC that it waives its right of exclusive processing and is terminating its proceeding. The existence of a worksharing agreement through which the state agency has, as an administrative matter, decided to notify the EEOC beforehand of its intention in writing should not lead to a different result. See 29 C.F.R. 1601.13(a)(5)(ii)(A).[8]

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[8] Cf. *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 755 (1979), in which this Court construed Section 14(b) of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 633(b), which "was patterned after and is virtually *in haec verba* with § 706(c) of Title VII" and which is similarly "intended to give state agencies a limited opportunity to resolve problems of employment discrimination" by similarly requiring that state proceedings be "commenced" prior to judicial proceedings. The Court held that the happenstance that the applicable state statute of limitations might bar any state agency proceedings did not mean that those state proceedings were not "commenced" within the meaning of Section

To be sure, the very purpose of a worksharing agreement is to promote efficiency, and thus the existence of such an agreement undercuts one underlying rationale of the 300-day filing period in cases of concurrent jurisdiction. Congress, however, did not decide in Title VII to require worksharing agreements, but instead decided to provide for extended filing periods in Section 706(e), regardless of the manner in which the EEOC and the state agency chose to work together. Section 706(e) cannot have been intended to make the applicable filing period turn on the terms of a worksharing agreement, with which most complainants will be unfamiliar.[9] "[A] court should [not] read in a time limitation provision that Congress has not seen fit to include" (*Mohasco Corp.* v. *Silver*, 447 U.S. at 816 n.19), especially in a "statutory scheme in which laymen, unassisted by trained lawyers, initiate the process" (*Love* v. *Pullman Co.*, 404 U.S. at 527).

2. The Fourth Circuit's ruling is, as petitioner contends (Pet. 23-24), inconsistent with *Isaac* v. *Harvard University*, 769 F.2d 817, 827-828 (1985), in which the First Circuit found timely a charge filed under circumstances akin to those present here. In *Isaac*, the complainant submitted his charge to the

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14(b) of the ADEA, when the EEOC referred a charge to the state agency.

[9] Under the Fourth Circuit's view, a complainant under the jurisdiction of a state FEP agency cannot, contrary to this Court's decision in *Mohasco Corp.* v. *Silver*, 447 U.S. at 814 n.16, safely file a charge with the EEOC on the 240th day. Presumably, only if the state agency chose to exercise its right to make an exception to its general waiver of the exclusive period for charges initially filed with the EEOC (see C.A. App. 84) would the 300-day filing period apply.

EEOC 241 days after the alleged discriminatory practice and EEOC referred the charge to the state agency. On the 263rd day, EEOC received from the state agency a form stating that pursuant to its worksharing agreement with the EEOC, the state "would not process the charge" (769 F.2d at 819). As in this case, the state agency had generally waived its right to exclusive initial processing for charges originally filed with the EEOC (*id.* at 825).

The First Circuit rejected the employer's contention that the state proceedings had not been "terminated" under Section 706(c) by the state's waiver and therefore not timely filed within 300 days under Section 706(e). Although the court did not directly address the issue, the court, by necessary implication, must have determined that the charge had been "initially instituted," within the meaning of Section 706(e), notwithstanding the waiver in the worksharing agreement. Otherwise, there would not have been any state proceedings to "terminate," nor would the 300-day limitations period have been applicable. The First Circuit has thus rejected the reasoning adopted by the Fourth Circuit in this case.[10]

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[10] The Fourth Circuit's ruling in this case also appears to be at odds with *EEOC* v. *Shamrock Optical Co.*, 788 F.2d 491, 493-494 (8th Cir. 1986), *Thomas* v. *Florida Power & Light Co.*, 764 F.2d 768, 771 (11th Cir. 1985), *Howze* v. *Jones & Laughlin Steel Corp.*, 750 F.2d 1208, 1211 (3d Cir. 1984), *Smith* v. *Oral Roberts Evangelistic Ass'n, Inc.*, 731 F.2d 684, 687-690 (10th Cir. 1984), and *Jones* v. *Airco Chemical Co.*, 691 F.2d 1200, 1202-1204 (6th Cir. 1982). In each of those cases, the courts of appeals held, consistent with *Mohasco Corp.* v. *Silver, supra*, that the 300-day filing period applied to a charge filed with the EEOC even when the state agency might be barred from acting under the applicable state statute of limitations.

3. Review is also warranted because the question presented by the petition is of exceptional public importance. Pursuant to Section 709(b) of Title VII, the EEOC currently has entered into worksharing agreements with 42 states, the District of Columbia, Puerto Rico, and the Virgin Islands, and approximately 35 municipal agencies. The decision of the court of appeals threatens to undermine the effectiveness of those agreements, render untimely hundreds of pending Title VII charges within the Fourth Circuit,[11] and cast doubt upon thousands of pending and future discrimination charges nationwide.[12] Unless the Fourth Circuit's decision is overturned, in order to avoid misleading claimants to their detriment the EEOC will be compelled to alter its worksharing agreements with state and local FEP agencies, with a concomitant decrease in the efficiency of Title VII administration, contrary to Congress' desire "to encourage the prompt processing of all charges of em-

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[11] Within the Fourth Circuit, the EEOC has worksharing agreements with state agencies in South Carolina, West Virginia, and Maryland, and with local agencies in Virginia, North Carolina, and Maryland. Looking only at Maryland and South Carolina, the EEOC estimates that at least 331 Title VII charges filed between January 1, 1984 and April 1, 1986, would be invalidated by the Fourth Circuit's opinion on timeliness grounds.

[12] Under one interpretation, the Fourth Circuit's decision might even invalidate charges lodged with the EEOC within 180 days. If, as the Fourth Circuit held, filing a charge over which the state waives initial processing cannot "initially institute" state agency proceedings, within the meaning of Section 706(e), it arguably also cannot "commence" state proceedings, within the meaning of Section 706(c), which is necessary to perfect any federal filing. The Fourth Circuit has already suggested the possibility of this extreme result (Pet. App. 53 n.3).

ployment discrimination" (*Mohasco Corp.* v. *Silver*, 447 U.S. at 825 (footnote omitted)).

4. Although we believe that review of the Fourth Circuit's decision is warranted, the Court may wish to postpone its disposition of the petition because the Fourth Circuit has granted rehearing *en banc* in *EEOC* v. *Ocean City Police Department*, 787 F.2d 955 (1986), which offers an opportunity for the court to reconsider the panel ruling in this case. In *Ocean City*, the employer raised the same timeliness challenge raised in this case in the context of an EEOC subpoena enforcement action, and the same panel which decided this case held only that untimeliness of an underlying charge would offer no defense to a subpoena enforcement action. The EEOC supported the petition for rehearing and suggestion for rehearing *en banc* in *Ocean City* and indicated in its submission that to facilitate the court's reconsideration of the timeliness issue, the EEOC would be willing to waive its contention that issues regarding timeliness are not properly litigated in subpoena enforcement actions. It is not clear whether the court of appeals will address the timeliness issue.[13]

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[13] On July 9, 1986, the court of appeals in this case denied a motion by the EEOC, which participated as amicus curiae before the panel, to intervene. The intervention motion tendered a petition for rehearing and suggestion for rehearing *en banc*. In addition, following the grant of rehearing *en banc* in *Ocean City*, the EEOC filed with the Fourth Circuit a motion for clarification of its order, asking specifically whether the court intended to reconsider the panel ruling in this case. The court of appeals acted on the motion by stating that "the Court will consider only such arguments as are pertinent to the disposition of th[e] case" (Order of August 1, 1986). Oral argument in *Ocean City* is scheduled for October 7, 1986.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 491507 20317